16

FILE
SEP 10 19
HAROLD B. WILLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 333.

EVERETT EDWARD HACK,
Petitioner, *Appellant below,*

v.

UNITED STATES OF AMERICA,
Respondent, *Appellee below.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALBERT WARD,
PALMER K. WARD,
318 Insurance Building,
Indianapolis, Indiana,
Atlantic 8450,
Counsel for Petitioner.

FERDINAND SAMPER,
Of Counsel,
816 Odd Fellow Bldg.,
Indianapolis, Indiana.

INDEX

	Page
Petition for Writ of Certiorari	1
I. Opinions below	2
II. Basis of this Court's Jurisdiction	2
III. Questions Presented	3–4
Statutes Involved	4
Constitutional Provisions	4, 5
IV. Summary Statement of the Matter Involved	5–16
V. Specification of Errors to be Urged	16
VI. Reasons for Granting the Writ	17–27
Conclusion	27

LIST OF AUTHORITIES

	Page
Ayervais v. United States, 72 F. (2d) 720, 721	21
Beckett v. Hudspeth, Warden, 131 F. (2d) 195, 197	26
Burton v. United States, 151 F. (2d) 17, 18	16, 26
Ex parte Bain, 121 U. S. 1	18
Fiswick v. United States, 329 U. S. 211, 227, 67 S. Ct. 224, 227	24
Glasser v. United States, 315 U. S. 60-80	16
Hagan v. United States, 295 Fed. 656, 658	18
Krulewitch v. United States, 336 U. S. 440, 442, 69 S. Ct. 716, 718	24
Logan v. United States, 144 U. S. 263, 309	24
Matchok, et al. v. United States, 60 F. (2d) 266, 267	21
Nye & Nissen v. United States, 336 U. S. 613, 619, 69 S. Ct. 766, 769, 770	20
Sealfon v. United States, 332 U. S. 575, 68 S. Ct. 237	27
Sharp v. United States, 195 F. (2d) 998	16
Thomas v. District of Columbia, 90 F. (2d) 424	26
Tresca v. United States (2 Cir.), 183 F. (2d) 736, 738	20
United States v. Carll, 105 U. S. 611, 613	17
United States v. Falcone (2 Cir.), 109 F. (2d) 579, 581	20
United States v. Gardner (7 C. A.), 171 F. (2d) 753, 759	18
United States v. Hess, 124 U. S. 483, 488	18
United States v. Peoni (2 Cir.), 100 F. (2d) 401, 402	20
United States v. Ruffino, 67 F. (2d) 440, 441	18
United States v. Simmons, 96 U. S. 360, 362, 366	18

CONSTITUTION OF THE UNITED STATES

Page

Fifth Amendment to the Constitution.....4, 26, 27

Sixth Amendment to the Constitution..... 5, 25

STATUTES

Title 28 U. S. C. Sec. 1254 (1)..... 3

Title 18 U. S. C. Sec. 472..... 3, 4, 5, 6, 22

Title 18 U. S. C. Sec. 2..... 4

Title 18 U. S. C. Sec. 371..... 4, 5, 6

RULES OF COURT

Rule 12(b)(2), Federal Rules of Criminal Procedure 19

Rule 11(b), Federal Rules of Criminal Procedure... 19

Rules 52(b), Federal Rules of Criminal Procedure... 19

Rule 27, 6, Supreme Court Rules..... 19, 27

Rule 33, Federal Rules of Criminal Procedure..... 24

Rule 52(b), Federal Rules of Criminal Procedure... 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. .....

EVERETT EDWARD HACK,
Petitioner, *Appellant below,*

v.

UNITED STATES OF AMERICA,
Respondent, *Appellee below.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Everett Edward Hack, hereinafter designated as defendant, prays that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Seventh Circuit, entered in the above entitled cause on June 24, 1953.

I

OPINIONS BELOW

This is a criminal case, tried by jury, and there is no memorandum opinion of the District Court; the instructions to the jury are not in the record.

The opinion of the Court of Appeals is not yet reported, but the majority opinion by Circuit Judges Finnegan and Swaim is in the record, pages 148-156; the separate opinion of Chief Judge Major, concurring in part, and dissenting in part, is on pages 156 and 157 of the record; when the petition for rehearing was denied "Judge Major voted to grant rehearing." (R. 167.)

II

BASIS OF THIS COURT'S JURISDICTION

The judgment of the Court of Appeals was rendered by a divided Court on June 24, 1953. (R. 158.) Defendant filed a petition for rehearing on July 7, 1953 (R. 159-165), which was overruled on July 16, 1953. (R. 167.) Mandate was stayed for 30 days on July 20, 1953 (R. 169); petition for further extension was filed on August 14, 1953 and on August 25, 1953 such extension was granted and the mandate was further stayed until and including September 14, 1953.

On August 12, 1953, Mr. Justice Jackson, for cause shown, upon the application of defendant, ordered that the time for filing petition for certiorari in this cause be extended to and including September 14, 1953.

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28 U. S. C.

This petition is presented by Everett Edward Hack, who was a party to, and a defendant in, the judgment of the United States Court of Appeals for the Seventh Circuit.

III

QUESTIONS PRESENTED

ONE

Is either count of the indictment, as amended, sufficient to authorize the judgment of conviction thereon?

TWO

Is there any substantial evidence in the record to sustain the conviction of the defendant of having procured Ada Miller to pass a counterfeit 20-dollar federal reserve note in Indianapolis on December 15, 1951 as charged in Count I of the indictment?

THREE

Is there any substantial evidence in the record to sustain the conviction of the defendant of having conspired with Ada Miller and David Bocock, at Indianapolis, Indiana, to violate Title 18 U. S. C. Section 472, by passing, and causing to be passed, with intent to defraud, of counterfeited obligations of the United States, as charged in Count II of the indictment?

FOUR

Did the Court commit reversible error in refusing defendant the right to file an amended motion for a new

trial and to present therein the question of the alleged inadequacy of his own personally selected counsel?

FIVE

Has the defendant suffered double punishment in the sentence of five years on the first count and three years on the second count, the evidence relied on by the Government being the same as to both counts?

STATUTES INVOLVED

Section 472, Title 18 U. S. C. provides that:

> "Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell * * * any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Section 2, Title 18 U. S. C. provides that:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Section 371, Title 18 U. S. C. provides that:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides that no person shall be

> "subject for the same offense to be twice put in jeopardy of life or limb" * * * nor be "deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

V

SUMMARY STATEMENT OF THE MATTER INVOLVED

Count I (18 U. S. C. Section 472) charged that on or about the 15th day of December, 1951, Ada Miller did, at Indianapolis, Indiana, in the Indianapolis Division of the Southern District of Indiana, with intent to defraud, pass a counterfeited obligation of the United States, to-wit: a 20-dollar federal reserve note on the Federal Reserve Bank of New York, New York; that Edward Everett Hack and David D. Bocock did procure the commission of said offense by Ada Miller. (R. 1, 2.)

Count II (18 U. S. C. 371) charged that on or about the 13th day of December, 1951, and continuously thereafter until the 20th day of December, 1951, Edward Everett Hack, Ada Miller and David Bocock did, at Indianapolis, Indiana, in the Indianapolis Division of the Southern District of Indiana, conspire to commit an offense against the United States, to-wit: to violate Title 18 U. S. C. Section 472, by passing and causing to be passed, with intent to defraud, counterfeited obligations of the United States, and the following of said persons did the following acts to affect the object of said conspiracy. The overt

acts alleged are omitted because defendant claims the indictment does not charge an offense, and there is no evidence to support the charge as made in the conspiracy count. (R. 2.)

On the 28th day of March, 1952, the attorney for the United States asked leave of Court to amend the indictment by reversing the name of Edward Everett Hack, to Everett Edward Hack, which leave was granted by the Court and the indictment was amended accordingly. (R. 3.)

The defendants entered a plea of not guilty, and on November 12 and 13, 1952, they were jointly tried by jury, being represented by counsel of their own choice; defendants' motion for judgment of acquittal at the close of the Government's case was made on November 12, 1952 (R. 61) and overruled on November 13, 1952 (R. 64, 65, 66, 134); the Government admitted that the actual passing of the note at the Goodman Store "was restricted to Ada Miller" (R. 61), and admitted that "There is no direct proof that these men (Hack and Bocock) induced or procured Ada Miller to pass it." (R. 62.)

The defendants were found guilty as charged in both counts of the indictment (R. 133) and on November 13, 1952 the defendant, Everett Edward Hack, was sentenced by the Court to five years on Count I, and to three years on Count II, the latter sentence to begin to run after the completion of, or the legal release from, the sentence imposed upon him under Count I. (R. 134, 135.)

Defendant Hack filed a motion for a new trial on November 17, 1952, alleging that (1) the verdict is contrary to the weight of the evidence and (2) the verdict is not supported by substantial evidence (R. 136); on December 15, 1952, the defendant Hack, having obtained other counsel, filed a petition for leave of Court to file an amended

motion for new trial, and to include in such amended motion "allegations of inadequate counsel during trial based upon the allegations of only one hour's preparation for trial, absence of material defense witnesses pertinent to alibi, and unchallenged hearsay evidence" (R. 138); these motions were denied by the Court on December 16, 1952. (R. 139.) His notice of appeal to the United States Court of Appeals for the Seventh Circuit was filed on December 22, 1952 (R. 140); he was admitted to bail pending appeal. (R. 141.)

The contested issues in the Court of Appeals which are brought forward in this petition were: (1) whether or not the evidence was sufficient to support the verdict as to defendant Everett Edward Hack under either or all counts of the indictment; (2) whether or not the weight of the evidence was contrary to the verdict as to Everett Edward Hack under either or all counts of the indictment (R. 151); and (3) allegations of inadequate counsel during the trial based upon allegations showing merely one hour of preparation for trial, absence of material defense witnesses, and unchallenged hearsay evidence. (R. 151, 152.)

The issue concerning the allegation of inadequate counsel during the trial first appears in the direct examination of Monroe Ellis Hack where, on pages 24 and 25, the witness was relating a conversation between himself and his wife, and the trial Court, on page 26, said:

> "The Court: I would like to interrupt here a moment. Is there going to be any objections to any of this hearsay evidence?
>
> Mr. Blanchard: (For the Defts.) I would like him to ramble on, Judge. There's no objection to it.
>
> The Court: I don't want the jury to be misinformed in any way. I only want proper evidence to go before the jury. Are you waiving any objection?

Mr. Blanchard: (For the Defts.) I am waiving it, Judge. Let him bring it all out.

The Court: You may proceed."

Further hearsay testimony was permitted to go in on pages 26 and 27, and on page 28 the Court again interrupted as follows:

"The Court: May I interrupt again? Are you waiving objections to this hearsay evidence?

Mr. Blanchard: (For the Defts.) Well, to facilitate the trial, Judge, I will object to that.

The Court: You are waiving objection?

Mr. Blanchard: (For the Defts.) It doesn't make any difference. I just want to get through.

The Court: All right."

Very prejudicial hearsay testimony was given on pages 28, 29, 30, 31, 32, 33 and 34, and on page 35 the Court again raised the question as follows:

"The Court: Pardon me. Are you not going to object to any of this hearsay evidence?

Mr. Blanchard: (For the Defts.) That's the Commonwealth's witness—the District Attorney's witness, Judge, I will let him talk.

The Court: There is a lot of irrelevant—

Mr. Blanchard: (Interposing for the Defts.) Unless the Court wants to step in and stop it.

The Court: A lot of inadmissible evidence going in before the jury. It's the Government's case. You are waiving any objection?

Mr. Blanchard: (For the Defts.) Yes, Sir.

The Court: Let's proceed."

1. Defendant Everett Edward Hack was 34 years of age at the time of the trial; he had resided in Indianapolis, Indiana about 15 years; for about 5 years he had operated a Used Car Lot business at 3727 Massachusetts Avenue, Indianapolis, and had maintained his residence at that location, living in a house trailer on the used car lot. (R. 91.) His general reputation for veracity (he testified in his own behalf—R. 91), honesty and good conduct among those who knew him best was good. (R. 108.) The record does not disclose that he ever had any previous connection with crime.

2. He was a brother of the defendant, Ada Miller, and of Monroe Ellis Hack, each of whom maintained a residence in Louisville, Kentucky. (R. 22, 67.) Monroe Ellis Hack was a carpenter, and had previously built a garage for the defendant. (R. 41, 92.) Defendant Hack knew, and was a friend of, the defendant David Bocock (R. 92), who bought some cars and sold them from defendant Hack's used car lot, more or less on consignment. (R. 96.)

3. On or about the 9th day of December, 1951, defendant Everett Edward Hack, his wife, and Ada Miller, and David Bocock visited Monroe Ellis Hack and his wife, Virginia, at their residence in Louisville, Kentucky; Ada Miller had told Everett Edward Hack that Monroe Ellis Hack, whom Everett had not seen for about six years because of his being in California, was at their home in Louisville and they drove by (R. 78) and remained there about fifteen minutes. (R. 41.) The record does not disclose any part of the conversation at this meeting, except they asked Ada Miller to go back to Indianapolis with them, which she did. (R. 52.) This was the only time that Everett Edward Hack was in Louisville.

4. On or about the 11th day of December, 1951, Ada Miller, at the instance of Everett Edward Hack, called

Monroe Ellis Hack in Louisville, from Indianapolis, and asked him to come to Indianapolis to discuss with Everett the building of a garage. (R. 69, 92.) On the following day at approximately seven o'clock p. m. Monroe Ellis Hack, his wife, Virginia, and his son, Lloyd, arrived at Everett Edward Hack's used car lot in Indianapolis. Upon their arrival Monroe went into the office and Everett was there; Virginia and Lloyd started to walk in the office and Ada Miller came out and said a few words to Monroe and Everett and she then took Virginia and Lloyd into the trailer which was next door to the used car lot office. While Everett Edward Hack and Monroe Ellis Hack were in the car lot office they commenced an evening of discussion and the drinking of alcoholic beverages. (R. 23.) They talked of building a garage, and of Everett's employing Lloyd to drive cars for him which he would buy in Detroit and elsewhere, which Everett transported. (R. 94.)

5. According to the evidence of Monroe Ellis Hack, at this meeting on the night of December 12, 1951, Everett started in talking to him and explaining about a counterfeit money deal, and was bragging on how much money he had; Everett said he had more money than he knew what to do with; according to Monroe, he said, "Well, Everett, I don't know whether you have or not. From what I hear, you have all kinds of money and from what I see you have both good and bad, and—"For he had this money there and he was showing me this money around two-thousand dollars." Monroe said he pleaded with Everett to get him out of the racket, and told him it was dangerous, but Everett said, "I have got all kinds of money" and "I'm in it for the excitement." (R. 24.) Monroe testified that Everett showed him some of the money and said it was counterfeit money, the way he put it though that was

"real mint" (R. 37); Monroe testified that Everett wanted him to go in with him on it, and first wanted him to go back to California and be a distributor out there. Monroe said he tried to talk Everett out of it, but Everett finally told him, around midnight, or maybe one o'clock, "You be back here the following morning" and "I'll give you instructions where to go" and "I'll give you orders what to do." Monroe said he told Everett, "Well, I'll think it over." (R. 23, 24.) Monroe says they then went to get a cup of coffee and, after some further conversation about a very sore jaw which Lloyd had, and about getting medical treatment for it, Monroe Ellis Hack, his wife, Virginia, and his son, Lloyd, left the used car lot and proceeded to a downtown hotel in Indianapolis. Upon their departure from the car lot Monroe said to Everett, "We will see you in the morning." (R. 25.) Monroe testified that Everett had explained to him that he was the head man and Monroe should take orders from him. (R. 27.)

6. Monroe, Virginia and Lloyd got in their car and drove to the hotel, and, after renting rooms, called the police and asked for two plainclothes men to meet them at the hotel; they arrived in a very few minutes and advised Monroe to call the Secret Service; he called the Secret Service man and talked with him close to an hour; the Secret Service man advised that he should go to Louisville and gave Monroe a 'phone number to call when he got to Louisville; Monroe did not go back to see Everett, but during the day Monroe, Virginia and Lloyd drove from Indianapolis to Louisville, arriving there too late to contact the Secret Service there on Friday (R. 26); on Saturday Monroe failed to contact any officers in Louisville; Sunday night he called Captain Evans of the Louisville Police Department, relayed part of it to him and asked him to come to the bus station and meet him and his wife,

which he did; with Captain Evans they then went to Police Headquarters and talked for quite a while and Captain Evans said he would call one of the Secret Service agents and finally called Agent Geiglein; on Sunday night Monroe relayed everything of the findings to Mr. Geiglein; after different conferences between Agents Geiglein and Fitzgerald and Monroe, Geiglein gave Monroe instructions to get some sample money from them (R. 27, 28, 29); Monroe said that on Monday, December 17, he had asked Geiglein and Fitzgerald for gasoline money and they said "no"; they said he should call Indianapolis; he did call Everett at Indianapolis collect and Monroe asked Everett to send him some money so he could take his son back to Cincinnati to the hospital and get his mouth unwired and taken care of; Everett told him he would be down and would bring the money, but he never came (R. 27, 28); later, on Monday, Monroe learned that Ada Miller was in Louisville in her own home; he called upon Ada and after talking with her for a short time he went away and again called Mr. Geiglein and explained to him that Ada was in Louisville; Geiglein asked him to come on in to the Secret Service office, which he did, and Geiglein and Fitzgerald told him to "just go and get some samples." (R. 29.)

7. In the neighborhood of between 5 and 6 o'clock of the same day (Monday), Monroe and his wife went home and around 6 o'clock Ada Miller knocked on his door and told him there was a gentleman out there to see him; Monroe went out to the car and the defendant, Mr. Bocock, was in the car; Bocock says, "Well, I got the money, let's go out and see where you are; with us or with the law"; whereupon Bocock handed Monroe four 20-dollar bills (R. 30); Monroe got in his car and drove away, followed by Ada Miller and Bocock in their car; the first stop made was at a whisky store on Lexington Road where he pulled

up in front of the place and stopped; Bocock and Ada Miller parked across the street; Monroe went in and bought a half pint of "Old Tub" whisky and cashed one of the 20-dollar bills which had been given to him; the whisky came to $1.53; he took the whisky and the change and left that place of business; he got in his car and went to the next place, and bought another half pint of "Old Tub"; Ada and Bocock had followed him and he gave the whisky to Ada and the money to Bocock (R. 31); Ada and Bocock drove away and Monroe waited a while and directly they came back and asked if he had passed any other bills, and upon being advised that he had not, they told him to go out and pass the other two; Monroe went out and passed the other two, and, upon going back to the house, he gave the money to Ada Miller and Bocock (R. 32); Monroe finally got hold of Mr. Geiglein, and after he had passed these four, Mr. Bocock gave him ten more notes and told him to go out and pass them; it was around 6:30 in the evening by the time he had passed the first four. (R. 33.)

8. Monroe testified that he had been trying all evening to get in touch with Geiglein, but through some misunderstanding with respect to locations they did not meet as planned. (R. 33.) Later in the evening Monroe and Geiglein did meet and Monroe showed him six or seven of the counterfeit notes and told him he had received them from Bocock and Ada Miller and asked Geiglein to pick them up; Geiglein said he didn't have any money (R. 34); Geiglein called Agent Fitzgerald and told him that Monroe had the money; Monroe talked with Fitzgerald and asked him what he should do with the money, and Fitzgerald informed Monroe that the office didn't open until eight o'clock the next morning. (R. 35.) Neither Geiglein nor Fitzgerald took the counterfeit notes and no arrest was then

made; this conference was between midnight of December 17 and two o'clock a. m. on December 18, 1951. (R. 35.) Later, in the morning of December 18, 1951, Monroe Ellis Hack was arrested in Louisville by the Secret Service agents upon the charge of passing counterfeit notes the night before (R. 85), but after eleven days in jail he was released; at the time of his arrest they found six or seven counterfeit notes on him. (R. 47.)

9. On December 15, 1951 a woman identified as the defendant, Ada Miller, went into the Goodman Shoe Store, located at 5539 East Washington Street, Indianapolis, and passed what purported to be a 20-dollar bill, which was introduced in evidence as Government's Exhibit 1; it was a counterfeit 20-dollar federal reserve note on the Federal Reserve Bank of New York, New York. It was in similitude to the genuine 20-dollar federal reserve notes issued by the United States Government. (R. 6-11, 17, 18.) Special Agent George B. Loy testified that it was a dangerous and deceptive counterfeit note and that the average merchant would be apt to take in such a counterfeit note and not be able to tell its counterfeit nature. (R. 18.) The same person identified as defendant Ada Miller gave one of such notes to the cashier in the A & P Grocery Store at 5541 East Washington Street on the same day for some groceries, and when the cashier hesitated in making the change the woman said, "Honey, if you can't change that, I will give you a smaller bill"; she gave the cashier a smaller bill and took back the 20-dollar bill and left the store. (R. 11, 12.) Defendant Ada Miller testified in her own behalf and said she was never in either of those stores and she did not pass, or attempt to pass, either of said notes and that she was in Louisville on December 15, 1951. (R. 76, 78.) There is no evidence to show that the woman who passed, and attempted to pass, said notes on Decem-

ber 15, 1951 had any intent to defraud or that she had any knowledge that said notes were counterfeit.

Government's Exhibit 2 was identified as a package which Secret Service Agent Loy obtained at the Indianapolis Post Office in executing a search warrant on February 14, 1952, and he had taken from the package a quantity of counterfeit 20-dollar federal reserve notes on the Federal Reserve Bank of New York, New York, and marked them with his initials and the date he obtained them; the package contained $2,360 worth of counterfeit 20-dollar notes, had they been genuine; each bore the same serial number as Government's Exhibit No. 1, B-70909801-D. (R. 18.) The package had been wrapped, and addressed by defendant Ada Miller to William Brown and William Branham, c/o of Gen. Del. Indianapolis, Ind. (R. 19.) It was caused to be mailed in Louisville on or about December 19, 1951 (R. 53), by Ada Miller and Monroe Ellis Hack (R. 73, 74), but Ada Miller denied having knowledge of its contents. (R. 73.) Virginia Hack, wife of Monroe Ellis Hack, closely resembles the defendant, Ada Miller. Both of these individuals have practically the same height and build, and on different occasions have been mistakenly identified as the same person. (R. 70.)

10. At the time of the arrest of defendant Everett Edward Hack, on December 20, 1951, Agent Loy, and other agents under his direction, searched the office room of the Hack Auto Sales at 3727 Massachusetts Avenue; they did not find any counterfeit money on his place. (R. 20, 21.)

11. Everett Edward Hack testified in his own behalf and denied having any conversation with Monroe Ellis Hack about counterfeit money and said he did not discuss with him the uttering or passing of counterfeit money; he said he had never knowingly had any counterfeit money in

his possession, except a 20-dollar bill which he received from a customer in March, 1952, which he promptly turned over to Secret Service Agent Loy (R. 93, 94, 97, 98), which Loy confirmed. He said he never directly or indirectly passed any counterfeit money. (R. 95.)

Circuit Judges Finnegan and Swaim affirmed the judgment of the District Court upon the ground that the record discloses substantial evidence to support the conviction, and relied upon *Glasser* v. *United States*, 315 U. S. 60-80, *Sharp* v. *United States*, 195 F. (2d) 998, *United States* v. *Randall*, 164 F. (2d) 284 (R. 155); upon the issue of the alleged inadequacy of defendant's counsel, the Court of Appeals relied upon *Burton* v. *United States*, 151 F. (2d) 17, 18. (R. 153.)

Chief Judge Major filed a separate opinion wherein he said as to the conviction on Count I, "In my judgment, there is not a scintilla of evidence which in any manner, shape or form proves or tends to prove that appellant procured the commission of the offense alleged" (R. 157); as to Count II, Judge Major said, "I have decided, with some reluctance, that his testimony (Monroe Ellis Hack) was sufficient to connect appellant with the conspiracy charged in the second count. In other words, it presented an issue of fact for the jury" (R. 156); on appellant's petition for a rehearing Chief Judge Major "voted to grant rehearing." (R. 167.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In affirming the judgment, because the indictment failed to charge an offense, and because the indictment was altered.

2. In deciding that the record discloses substantial evi-

dence to support the conviction of defendant, Everett Edward Hack, as to Count I.

3. In deciding that the record discloses substantial evidence to support the conviction of defendant, Everett Edward Hack, as to Count II.

4. In deciding that defendant, Everett Edward Hack, was not entitled to file an amended motion for a new trial and present therein the question of the alleged inadequacy of his personally selected counsel in allowing an unusual amount of prejudicial hearsay testimony to be admitted without objections thereto.

5. In deciding that defendant could be punished twice for the same offense.

REASONS FOR GRANTING THE WRIT

QUESTION ONE

COUNTS I AND II

1. Count I of the indictment does not allege that the counterfeit bill or note that was passed on December 15, 1951 was passed "with knowledge that it was counterfeited"; nor does it allege who was to be defrauded, nor to whom the note was passed; it therefore omits essential elements of the offense referred to, and it fails to charge either of the defendants with any crime. (R. 1, 2.) As to the defendant Hack, the first count also fails to charge him "with intent to defraud." Count II fails to charge that the conspiracy to pass counterfeit notes would be with knowledge that such notes were counterfeited.

The decision of the majority of the Court of Appeals is in conflict with the applicable decisions of this Court in:

(a) *United States* v. *Carll*, 105 U. S. 611, 613, where it was decided that an indictment, which charges the passing or uttering of a counterfeit instrument, must allege that

the defendant had knowledge that the instrument was counterfeited, and such allegation was essential to make out the crime.

(b) *United States* v. *Simmons,* 96 U. S. 360, 362, 366, which holds that an indictment which omits an essential element of the crime charged "is insufficient to authorize a judgment thereon." (366.)

(c) *United States* v. *Hess,* 124 U. S. 483, 488, which decides that an indictment which omits an essential element of the crime involved, is a matter of substance, and such omission is not aided or cured by verdict. This contention applies to both counts of the indictment, as a conspiracy to pass counterfeit instruments, without knowledge that they were counterfeit, would not constitute the crime of conspiracy. *United States* v. *Gardner,* 171 F. (2d) 753, 759. (7 C. A.)

2. The majority opinion of the Court of Appeals is a decision in conflict with a decision on the same matter in the Second Circuit in *United States* v. *Ruffino,* 67 F. (2d) 440, 441, where it was held that it was essential to the Government's case to establish by some evidence that defendants knew that the note was a counterfeit bill and was uttered, or passed, with intent to defraud; it is in conflict with the decision of the Sixth Circuit in *Hagan* v. *United States,* 295 Fed. 656, 658, where the Court held that specific knowledge or belief is made an essential element of the crime of passing counterfeit instruments.

3. The Court made an order granting leave to the United States Attorney to "amend the indictment by reversing the name of the defendant, Edward Everett Hack, to Everett Edward Hack * * * and the indictment is amended accordingly." (R. 3.) This procedure is in conflict with the former decision of this Court in a similar matter in *Ex parte Bain,* 121 U. S. 1.

4. This question was not directly presented to the lower courts, but we believe the defendants' motion for acquittal (R. 61) and the motion of Hack for a new trial (R. 136), would challenge the sufficiency of the indictment as to omission of essential parts. Regardless of whether it was presented, defendant now respectfully urges that the defects in the indictment, and its alteration, prejudicially affected his substantial rights, and the rendition of the judgment thereon was a plain defect and an error which should have been corrected by the trial Court as directed by Rule 12(b) (2), Federal Rules of Criminal Procedure, that "failure of the indictment to * * * charge an offense *shall be noticed* at any time during the pendency of the proceedings" (emphasis supplied), and should have been noticed by the Court of Appeals under its Rule 11 (b), Rule 52(b), Federal Rules of Criminal Procedure, and now should be noticed by this Court under Rule 52 (b) and its Rule 27, 6, as the question is of extraordinary importance in the trial and conviction of all defendants charged with crime.

QUESTION TWO

COUNT I

1. As Chief Judge Major points out in his dissenting opinion (R. 158), there is not a scintilla of evidence which in any manner, shape or form proves or tends to prove that defendant Hack procured the commission of the offense of passing the counterfeit bill of December 15, 1951.

2. There is not a word of testimony that Ada Miller received any counterfeit money from defendant Everett Edward Hack; or that they ever had any conversation relative thereto; or that Hack had any knowledge that she had counterfeit money, or that she intended to pass the same, or that he promoted the passage of said bill, or did any affirmative purposive act toward passing said bill,

and there are no circumstances which connect Hack with Ada Miller in any way with the passing of said bill on December 15, 1951; there is no evidence to show that defendant Hack, or the person who passed said counterfeit bill, had any knowledge that said bill was counterfeited, or had any intent to defraud, when the same was passed; the Government admitted that "it is perfectly true that the evidence in the case, so far as the actual passing of the note at that department store was restricted to Ada Miller" (R. 61); there is no evidence that defendant Hack associated himself in any manner with Ada Miller, or that he sought by his action to have the passage of such bill succeed, or that he participated in such act as in something that he wished to bring about, and there is no evidence to show that he had any connection with anyone in the passage of said bill, or that he procured, or counseled, or aided or abetted anyone in the passage of said bill.

3. The decision of the majority of the Court of Appeals that there was substantial evidence to support the conviction is in conflict with the decision of this Court in *Nye & Nissen* v. *United States* (1949), 336 U. S. 613, 619, 69 S. Ct. 766, 769, 770, where it is held that:

> "In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

4. The majority opinion of the Court of Appeals is a decision in conflict with the decisions on the same matter in the Second Circuit in *United States* v. *Peoni*, 2 Cir. 100 F. (2d) 401, 402, *United States* v. *Falcone*, 2 Cir. 109 F. (2d) 579, 581, and *Tresca* v. *United States*, 2 Cir. 183 F. 736, 738, which hold that to convict one as an abettor, the evidence must show that the attitude of the defendant

toward the forbidden undertaking was positive; he must in some sense promote the unlawful venture himself, make it his own, and have a stake in its outcome; it must be shown that defendant did some affirmative purposive act toward the crime committed.

5. The decision of the majority of the Court of Appeals is in conflict with the decisions on the same matter in the Third Circuit in *Ayervais* v. *United States,* 72 F. (2d) 720, 721, and *Matchok, et al.* v. *United States,* 60 F. (2d) 266, 267, which hold that circumstantial evidence relied upon for conviction of a defendant of aiding and abetting must be more than suspicion, and must be such as to exclude every reasonable hypothesis but that of guilt.

6. The importance of this question is accentuated by the very decisive dissenting opinion of Chief Judge Major, and it goes to the very heart of criminal procedure in all cases where defendants are deprived of their liberty, where there is no evidence to show guilt.

QUESTION THREE

COUNT II

1. When this question was decided by the Court of Appeals on June 24, 1953, Chief Judge Major, in his separate opinion, said that, "I have decided, with some reluctance, that his (Monroe Ellis Hack) testimony was sufficient to connect appellant with the conspiracy charged in the second count." (R. 156.) When the petition for rehearing was denied by Circuit Judges Finnegan and Swaim, "Judge Major voted to grant rehearing." (R. 167.)

2. Defendant now respectfully urges that there is no evidence to establish the charge in Count II that on or about December 13th to December 20th, 1951, Edward Everett Hack, Ada Miller and David Bocock did, at In-

dianapolis, Indiana, conspire to commit an offense against the United States, to-wit: to violate Title 18 U. S. C., Section 472, by passing and causing to be passed, with intent to defraud, counterfeited obligations of the United States. (R. 2.)

3. The conspiracy charged was not proved; there is no evidence of *corpus delecti* as to the conspiracy charged; the conversation between Monroe Ellis Hack and Everett Edward Hack on December 13, 1951, made no reference to the passage of any counterfeit instruments in Indiana, nor any discussion as to the two Hacks being associated with Ada Miller and David Bocock, and their names were not mentioned; in that conversation, according to Monroe Ellis Hack, the defendant wanted him to go back to California and be a distributor out there. (R. 24.) Monroe said he told Everett, "Well, I'll think it over." (R. 24.) He then went directly to the police and to the Secret Service Agent in Indianapolis; the Secret Service Agent in Indianapolis told him to see Secret Service Agents in Louisville, which he did on the following Sunday; on Monday, December 17, 1951, in Louisville, while working under the instructions of the Secret Service Agents in Louisville, Monroe says he received fourteen counterfeit notes from defendant Bocock, six or seven of which Monroe passed in Louisville on that date, he says with knowledge of the Secret Service Agents, and with Ada Miller and Bocock following him to his various victims, Miller and Bocock not knowing that Secret Service Agents had been alerted. (R. 26, 27, 28, 29, 30, 31, 32.)

4. There is no evidence of any kind to connect Everett Edward Hack with any of the transactions in Louisville. We have heretofore shown that he had no connection with anyone in the passage of the counterfeit bill on December 15, 1951.

5. There is no charge in the indictment that Everett Edward Hack conspired with Monroe Ellis Hack, or that Everett Edward Hack conspired with anyone to pass counterfeit money in Louisville; Monroe Ellis Hack was not charged as a co-conspirator in the Indiana conspiracy, and no one is referred to in the indictment as being "an unknown" conspirator.

There is simply no evidence to connect Everett Edward Hack with the Indiana conspiracy charged in the indictment.

6. It is important to note that there is no claim in the record that Monroe Ellis Hack had any connection of any kind with Everett Edward Hack after December 13, 1951, except his request by telephone for money on December 17th; there is no claim that Monroe was acting in concert with Everett in any of the Louisville transactions; there is no denial of Monroe's evidence as to his collaborating with the Chief of Police and the Secret Service Agents in Louisville as to the passing of counterfeit bills in Louisville; they wanted to get samples of the bills; under these facts and circumstances, none of the acts and declarations of Monroe Ellis Hack in Louisville could be used to convict Everett Edward Hack of the alleged Indiana conspiracy; what Monroe said and did in Louisville was not in furtherance of any conspiracy which might have involved Everett, because whatever plot he may have had with any of the defendants clearly terminated when he began passing counterfeit bills in Louisville after his confession to the officers; in fact, he ceased his role as a conspirator, if he ever had one with Everett, when he called the police, and the Secret Service Agent at Indianapolis, and told them of his conversation with Everett; from thence forward, according to his testimony, for two or three days he was working under the surveillance of the Secret Service

Agents in Louisville in passing counterfeit bills in Louisville; as such, he was not a conspirator with either of the defendants; he was trying to get from the defendants some sample counterfeit bills for the Secret Service Agents. This being the undisputed record, all of the acts and declarations of Monroe Ellis Hack in Indianapolis and in Louisville, and all of the declarations of the officers aforesaid, were hearsay as to Everett, but such evidence was highly prejudicial as to him, and there is no substantial evidence in the record to convict Everett Hack on Count II.

7. The decision of the majority of the Court of Appeals that there is substantial evidence in the record to convict Everett Edward Hack on Count II is in conflict with the decisions of this Court in (a) *Fiswick* v. *United States,* 329 U. S. 211, 227, 67 S. Ct. 224, 227; (b) *Logan* v. *United States,* 144 U. S. 263, 309, and (c) *Krulewitch* v. *United States,* 336 U. S. 440, 442, 69 S. Ct. 716, 718, which hold that admissions and declarations of a co-conspirator after confession of his own guilt to officers, are inadmissible against his erstwhile fellow conspirators.

QUESTION FOUR

Rule 33, Federal Rules of Criminal Procedure, provides that

> "The Court may grant a new trial to a defendant if required in the interest of justice."

Counsel who represented the defendant at the trial filed a motion for new trial on November 17, 1952 (R. 136), within five days after the judgment was entered on November 13, 1952. (R. 134.) Such motion did not allege any inadequacy of counsel. (R. 136.) On December 11, 1952 other counsel appeared for the defendant (R. 137) and on December 16, 1952 such counsel filed petition for

leave to file an amended motion for a new trial, which was denied on the same date (R. 139), which amended motion would have contained allegations of inadequate counsel during the trial based upon allegations showing merely one hour for preparation for trial, absence of material defense witnesses, and unchallenged hearsay testimony. (R. 152.)

Refusal of the Court to allow defendant to file an amended motion for a new trial, under the facts disclosed by the record, was an abuse of the power given the trial Court, as it presented a question of the constitutional right of the defendant to have the Assistance of Counsel for his defense; the trial Court recognized that hearsay testimony was going to the jury without any objection, and manifested his concern about improper evidence going to the jury, but defendant's counsel passed the matter off by saying, "I am waiving it, Judge. Let him bring it all out," (R. 26); again the Court took cognizance of the improper hearsay and asked counsel if he was waiving objections to "this hearsay testimony" and counsel replied, "It doesn't make any difference. I just want to get through" (R. 28); pages 28 to 35 of the record, containing hearsay declarations and statements of Monroe Ellis Hack and his conversations with members of his family, and with the officers, were given without objection, and the Court reminded counsel for defendant that "a lot of irrelevant" and "inadmissible evidence was going in before the jury. It's the Government's case. You are waiving objection?" Counsel replied, "Yes, Sir," "Unless the Court wants to step in and stop it." (R. 35.)

Under the Sixth Amendment to the Constitution, defendant was entitled to have the Assistance of Counsel for his defense; this means that he was entitled to have adequate counsel; we believe a reading of pages 23 to 35

of the record will convince the Court that a large amount of very harmful and prejudicial hearsay testimony went into the record without objection, and defendant should have been given the opportunity to file his amended motion for a new trial, and the denial of such right was an abuse of judicial discretion. The decision of the majority of the Court of Appeals to the contrary is in conflict with the decision of the Tenth Circuit, in *Beckett* v. *Hudspeth, Warden,* 131 F. (2d) 195, 197, which holds that the constitutional guaranty of the right to "Assistance of Counsel" means effective assistance as distinguished from bad faith, sham, or mere pretense; and it is in conflict with *Thomas* v. *District of Columbia,* 90 F. (2d) 424.

In the case of *Burton* v. *United States,* 151 F. (2d) 17, 18, relied on by the Court of Appeals (R. 153), the Court pointed out that the introduction of the hearsay testimony in that case was not prejudicial. We do not believe it is a case where the admission of such hearsay testimony can be accounted for on the theory of "good trial strategy," as concluded by the Court of Appeals. (R. 153.) It is a violation of the due process clause of the Fifth Amendment.

We do not believe this question has been decided by this Court, although it is an important question of federal law.

QUESTION FIVE

The defendant was sentenced to five years imprisonment on Count I, which was the substantive offense for which it was alleged the conspiracy charged in Count II was formed, the defendant having been charged as an aider and abettor in Count I, and as a co-conspirator in Count II.

The evidence of the Government to convict defendant of the charge in Count I was the same as it relied upon to convict him of Count II. It was therefore a double punishment in violation of the Fifth Amendment to the United

States Constitution to sentence defendant to 5 years on Count I and to 3 years on Count II, and the decision of the Court of Appeals to the contrary is in conflict with the applicable decision of this Court in *Sealfon* v. *United States,* 332 U. S. 575, 68 S. Ct. 237.

The defendant was not charged as a principal in Count I; the Government admits that he had no direct connection with the passing of the note in question; if he did anything to procure the commission of the offense of passing, it was to conspire with some one else, and this makes the basic facts in each case identical, and the sentence of imprisonment on Count I should be set aside.

This question was not presented to the Courts below, but it is a plain error and defect affecting the substantial rights of the defendant, and will affect the rights of all other defendants similarly charged, and it should be noticed by this Court and corrected pursuant to Rule 52 (b), Federal Rules Criminal Procedure, and Rule 27, 6 of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT WARD,
PALMER K. WARD,
318 Insurance Building,
Indianapolis, Indiana,
Atlantic 8450,
Counsel for Petitioner.

FERDINAND SAMPER,
Of Counsel,
816 Odd Fellow Bldg.,
Indianapolis, Indiana.

September 4, 1953.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	3
Argument	7
Conclusion	13

CITATIONS

Cases:

Bachrack v. *United States*, 75 F. 2d 824	8
Bain, Ex parte, 121 U.S. 1	8
Beckett v. *Hudspeth*, 131 F. 2d 195	12
Bell v. *United States*, 100 F. 2d 474	7
Burton v. *United States*, 151 F. 2d 17, certiorari denied, 326 U.S. 789	12
Colosacco v. *United States*, 196 F. 2d 165	13
Delaney v. *United States*, 263 U.S. 586	11
Dunbar v. *United States*, 156 U.S. 185	7
Felton v. *United States*, 170 F. 2d 153 (C.A. D.C.), certiorari denied, 335 U.S. 831	12
Fiswick v. *United States*, 329 U.S. 211	9
Graffi v. *United States*, 22 F. 2d 593	7
Hagner v. *United States*, 285 U.S. 427	8
Kann v. *United States*, 323 U.S. 88	10
Krulewitch v. *United States*, 336 U.S. 440	9
Logan v. *United States*, 144 U.S. 263	9
McKinney v. *United States*, 172 F. 2d 781	7
Nye & Nissen v. *United States*, 336 U.S. 613	10
Pinkerton v. *United States*, 328 U.S. 640	13
Price v. *United States*, 165 U.S. 311	8
Rosen v. *United States*, 161 U.S. 29	7
Sealfon v. *United States*, 332 U.S. 575	13
Thomas v. *District of Columbia*, 90 F. 2d 424	12
United States v. *Carll*, 105 U.S. 611	7, 8
United States v. *Crowe*, 188 F. 2d 209	13
United States v. *Johnson*, 319 U.S. 503	11

Statutes and Rules:

18 U.S.C. [1946 ed., Supp. V] 2, 62 Stat. 684	2
18 U.S.C. [1946 ed., Supp. V] 472, 62 Stat. 705	2

Federal Rules of Criminal Procedure:

Rule 7(c)	8
Rule 33	11

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 333

EVERETT EDWARD HACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 148-156) and dissenting (R. 156-157) opinions of the Court of Appeals are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 24, 1953 (R. 158) and a petition for rehearing was denied July 16, 1953 (R. 167). On August 12, 1953, by order of Mr. Justice Jackson, the time for filing a petition for a writ of certiorari was extended to September 14, 1953. The petition was filed September 10, 1953. The jurisdiction of

this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether an indictment, attacked for the first time in this Court, sufficiently charged petitioner with (1) procuring another to pass counterfeit currency with intent to defraud, and (2) a conspiracy to pass such currency.

2. Whether the evidence was sufficient to support petitioner's conviction.

3. Whether petitioner was denied effective assistance of counsel under the Sixth Amendment where his counsel deliberately waived objection to certain hearsay evidence.

4. Whether the substantive and conspiracy counts were for separate offenses for which consecutive sentences could be imposed.

STATUTES INVOLVED

18 U. S. C. [1946 ed., Supp. V] 472, 62 Stat. 705:

> Whoever, with intent to defraud, passes, * * * or attempts to pass, * * * any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

18 U. S. C. [1946 ed., Supp. V] 2, 62 Stat. 684:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

* * * * *

STATEMENT

Petitioner was charged in the United States District Court for the Southern District of Indiana in a two-count indictment, with (1) procuring, along with one Bocock, the passing, with intent to defraud, of a counterfeit $20 note by Ada Miller, in violation of 18 U. S. C. 472; and (2) conspiring with Bocock and Ada Miller to violate 18 U. S. C. 472 by the passing of counterfeit $20 notes (R. 1-2). Petitioner was found guilty on both counts, and given consecutive sentences of imprisonment for five years on count one and three years on count two (R. 134-135). On appeal the judgment was affirmed by the Court of Appeals, one judge dissenting in part (R. 140, 156, 158).

Evidence supporting the conviction may be summarized as follows:

Petitioner, Monroe Hack and Ada Miller, are brothers and sister. Petitioner operated a used car lot in Indianapolis, Indiana, and the other two lived in Louisville, Kentucky. (R. 22, 23.)

On or about December 9, 1951, petitioner, defendant Ada Miller, and another defendant, one Bocock, visited Monroe at the latter's home in Louisville, after which petitioner accompanied Ada and Bocock to Indianapolis (R. 36, 52, 77-78, 96). On December 11, Monroe was directed by Ada Miller in a telephone conversation from Indianapolis to come there the following day. Ada wired him $32 for the trip (R. 22-23, 52-53, 69).

On December 12, Monroe, his wife, and his son Lloyd arrived at petitioner's used car lot. Ada said to Monroe and petitioner, "Well, I will leave

you men alone," and took Monroe's wife and son to a trailer nearby, while petitioner and Monroe remained at the office. (R. 23.) Petitioner immediately began to explain a counterfeit money deal, and showed Monroe about $2,000 in "real mint" counterfeit currency. Monroe remonstrated against petitioner's illegal venture, but to no avail. Petitioner advised, "I'll give you orders what to do," and explained that "he was the head man and that [Monroe] would take orders from him." (R. 23-24, 27, 37.) Petitioner suggested that Monroe go to California as his distributor for the counterfeit currency. Petitioner directed Monroe to return the following morning, and Monroe stated that he would think it over. (R. 24.) Instead of returning to the used car lot, however, Monroe contacted the Indianapolis police, who advised calling United States Secret Service agents to his hotel room. After Monroe had discussed the counterfeit ring and the agents had given him a phone number to call in Louisville, he drove there with his family (R. 26).

On December 15, Ada Miller passed a $20 counterfeit note in an Indianapolis shoe store, this being the offense charged in count one. She left the store in such a hurry that she almost knocked down a woman and some children entering. (R. 6-7, 17.) On the same day she attempted to pass another $20 counterfeit note in an Indianapolis grocery store, but paid for her purchase with a good $5 bill when the clerk began to look with suspicion at the proffered counterfeit note (R. 11-13).

On December 17, Monroe reported to Secret Service agents Geiglein and Fitzgerald in Louisville, who suggested that he phone Indianapolis. In this telephone conversation Monroe, after being informed that Ada Miller was in Detroit, asked petitioner for hospital expense money for Monroe's son, and petitioner stated he would bring the money. (R. 27-28.) The agents told Monroe that all he had to do was "just get some samples" of the counterfeit money. When Monroe learned that Ada was in Louisville, not Detroit, he went to her home where Ada boasted that while in Detroit "she set the town on fire and got out". (R. 28.) Upon Monroe's informing the agents of Ada's presence in Louisville, they repeated that he should proceed to get some samples (R. 29).

Also on December 17, at about 6 p. m., Ada and Bocock drove to Monroe's house in Bocock's Chevrolet with Indiana license plates. While handing Monroe four counterfeit $20 notes, Bocock stated, "Well, I got the money. Let's go out and see where you are; with us or with the law." (R. 30, 48-49, 58.) With Monroe driving his car and Bocock and Ada following him, Monroe made a few purchases of whiskey and passed four $20 counterfeit notes. Monroe gave the whiskey to Ada and the change to Bocock. Bocock then gave Monroe ten more notes to pass. (R. 31, 32, 33.) Monroe finally met agent Geiglein, after having missed him earlier, and showed him the counterfeit notes. Monroe phoned agent Fitzgerald to inquire about what to do with the notes, but was informed that the office

did not open until 8 o'clock the next morning. (R. 34-35, 83, 84.)

On the morning of December 18, Monroe was arrested for having passed the counterfeit notes on the preceding evening, and was kept in jail 11 days before being released (R. 47, 85).

On December 19, Ada Miller gave Lloyd Hack (Monroe's son) a parcel to mail from Louisville. After he had done so, she informed him that he had just mailed about $2,000 in counterfeit currency. The parcel had been addressed by Ada to two persons in Indianapolis, and contained $2,360 in $20 counterfeit notes. (R. 18-19, 53, 55-56.) Shortly thereafter Ada turned herself in to the agents at Louisville (R. 74).

On December 20, petitioner and Bocock were arrested in Indianapolis. A search was made of petitioner's office, but no counterfeit money was found. (R. 20-21.)

Petitioner, testifying in his defense, professed innocence of the charges against him, denied that he discussed a counterfeit money plot with Monroe, and disavowed having any such money in his possession (R. 93, 94, 95, 97, 98). He admitted that he, Ada, and Bocock had met at Monroe's Louisville home around December 9, and stated that he asked Ada to phone Monroe to come to Indianapolis in order to build a garage for him (R. 92, 96).

Defendant Ada Miller, testifying on her own behalf, denied that she passed, or attempted to pass, any counterfeit $20 notes in Indianapolis on December 15 (R. 76, 78-79); denied forcing her brother Monroe to pass counterfeit bills on Decem-

ber 17 (R. 71); and asserted that Monroe told her to mail the parcel, which she, not knowing it contained counterfeit notes, gave to Lloyd to mail for his father (R. 73-74). She admitted that she had met with petitioner, Bocock and Monroe at the latter's Louisville home around December 9 (R. 77-78).

ARGUMENT

1. Although the question was not raised in either of the courts below, petitioner now contends that both counts of the indictment were fatally defective in failing to charge crimes (Pet. 17-19). There is, however, no substance to this contention.

Neither of the two counts specifically alleged that the counterfeit notes were passed with knowledge by the defendants that they were counterfeit. Both counts did, however, charge a passing of counterfeit notes "with intent to defraud", and before trial, with assistance of counsel, the defendants stated that they thoroughly understood "the charges against them" (R. 1, 2, 3). The allegations that the notes were passed with intent to defraud plainly implied that the defendants knew they were counterfeit for without knowledge of the counterfeit nature of the notes, the passing would not have been with intent to defraud. Cf. *McKinney* v. *United States,* 172 F. 2d 781, 783 (C. A. 9); *Bell* v. *United States,* 100 F. 2d 474, 478 (C. A. 5); *Graffi* v. *United States,* 22 F. 2d 593, 594 (C. A. 7).[1]

---

[1] The later decisions of this Court have deprived *United States* v. *Carll* 105 U.S. 611 (see Pet. 17) of any vitality. See *Dunbar* v. *United States,* 156 U.S. 185, 191-194; *Rosen* v.

In these circumstances the indictment was a "plain, concise and definite written statement of the essential facts constituting the offense charged" within the meaning of Rule 7(c), F. R. Crim. P. It stated facts sufficient to inform the defendants of the offenses with which they were charged so that they could properly defend themselves, and did this with sufficient certainty to protect them against another prosecution for the same offenses. Cf. *Hagner* v. *United States,* 285 U. S. 427, 431.

It is immaterial that count one did not allege who was to be defrauded, or to whom the note was to be passed. An accused, in a counterfeiting case, does not usually know his intended victim, but is interested primarily in passing the counterfeit to be accepted as genuine. Cf. *Bachrack* v. *United States,* 75 F. 2d 824, 825 (C. A. 5). The name of the victim was a detail of evidence which petitioner could have sought by a bill of particulars if he deemed the information necessary for his defense.[2]

2. Petitioner's contention (Pet. 19-24) that the evidence was insufficient to support his conviction under either the conspiracy or the substantive count is without merit.

(a) As to the conspiracy count, the evidence showed that on December 9, 1951, petitioner, co-

---

United States, 161 U. S. 29, 31-33; and *Price* v. *United States,* 165 U.S. 311, 312. *Carll,* moreover, was decided long prior to the advent of Rule 7(c), which was clearly satisfied here.

[2] The amendment of the indictment approximately seven months before trial to change petitioner's name from Edward Everett Hack to Everett Edward Hack (R. 3), was obviously not a substantial change such as was involved in *Ex parte Bain,* 121 U.S. 1. After this amendment, at the time of the arraignment, petitioner stated that he thoroughly understood the charges against him (R. 3).

defendants Ada Miller and Bocock, and Monroe Hack all met at Monroe's home in Louisville. Ada and Bocock returned to Indianapolis with petitioner. On December 11, at the instance of petitioner, Ada, in a long distance telephone conversation with Monroe, directed him to come to petitioner's place of business in Indianapolis the next day, and even wired him $32 expense money for the trip. After Monroe arrived with his family on December 12, petitioner, in an unsuccessful effort to get Monroe to join the conspiracy,[3] showed his $2,000 in "real mint" counterfeit currency, stated that he would give the orders about what to do, and announced that he was the "head man." On December 15, Ada passed a $20 counterfeit note in Indianapolis, and attempted to pass another. Ada then worked in collaboration with Bocock, who gave counterfeit bills to Monroe and supervised his passing of them in Louisville. When it looked as though the game was up, on December 19, Ada engineered the mailing of $2,360 of counterfeit notes to Indianapolis in an attempt to dispose of incriminating evidence.

The foregoing evidence was sufficient for the jury to have found petitioner guilty of participation in the conspiracy alleged. The court below was unanimous in adopting this view (R. 152, 156).

(b) The evidence was also sufficient to prove that

---

[3] *Fiswick* v. *United States*, 329 U.S. 211, *Logan* v. *United States*, 144 U.S. 263, and *Krulewitch* v. *United States*, 336 U.S. 440. Cited by petitioner for the proposition that admissions and declarations of a co-conspirator, after confession of his own guilt to officers, are inadmissible against his erstwhile fellow conspirators, are inapposite. Monroe's testimony related to acts and declarations by petitioner himself.

petitioner procured the commission of the offense of passing the $20 counterfeit note by Ada Miller on December 15 under count one of the indictment.[4] Although circumstantial, it was nevertheless adequate to support the jury's finding that petitioner procured the commission of the offense by Ada. Cf. *Nye & Nissen* v. *United States,* 336 U. S. 613, 619.

Petitioner and his sister Ada worked closely in the counterfeiting venture. At petitioner's instance, Ada made a long distance call from Indianapolis to Louisville, summoning Monroe to meet petitioner at Indianapolis, and wired Monroe $32 to make the trip. At the meeting on December 12 in Indianapolis, Ada stated to petitioner and Monroe, "Well, I will leave you men alone." The jury could reasonably infer from this that Ada well knew that petitioner was then going to discuss the proposed counterfeiting deal with Monroe, as he did. Monroe had seen about $2,000 in counterfeit money in petitioner's possession on December 12, and on December 15 Ada passed the $20 counterfeit note involved in count one. This combination of circumstances the jury could reasonably interpret as evidence that petitioner had associated himself with Ada's venture and sought by his action to make it succeed.

Both courts below having found the evidence sufficient to support conviction, there is no occasion for further review of the evidence by this Court. See *Kann* v. *United States,* 323 U. S. 88,

---

[4] It was upon this question that Judge Major dissented in the court below (R. 156-157).

93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

3. Nor is there any merit to petitioner's complaint that he was denied effective assistance of counsel under the Sixth Amendment by reason of his counsel's deliberate refusal to object to certain hearsay evidence narrated by Monroe Hack (Pet. 24-26).

This contention was not raised in petitioner's motion for a new trial filed on November 17, within five days after the verdict of guilty on November 13, 1952 (R. 134, 136). On December 11 petitioner employed different counsel, who on December 15 filed a petition for leave to file an amended motion for a new trial to raise this point, but this petition was denied (R. 137-139). As the court below correctly observed (R. 153), this petition did not comply with Rule 33, F. R. Crim. P.,[5] as it was filed out of time.

Moreover, putting aside the timeliness of this petition, the introduction of the hearsay evidence did not constitute reversible error. During the course of Monroe Hack's testimony, petitioner's counsel objected to Monroe's relating that his wife observed that he looked white as a ghost after his conference with petitioner about including Monroe in the counterfeiting venture, and this objection was sustained (R. 25). Thereafter, when other hearsay evidence was introduced and the court asked petitioner's counsel if he were not going to

[5] Rule 33: "* * * A motion for a new trial based on any other grounds [than newly discovered evidence] shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

object, counsel stated that he wanted the witness to "ramble on," and that he was "waiving" any objection (R. 26); that it did not make any difference if he waived objection or not, since he just wanted "to get through" (R. 28); and that he would "let [the witness] talk", and was waiving any objection (R. 35).

It is thus apparent that petitioner's counsel deliberately chose, as a matter of what he considered good trial strategy, to object to some hearsay evidence and to allow other hearsay to go in without objection. Most likely, petitioner's counsel reasoned that, by permitting the witness to "ramble on," counsel would enjoy a broader scope for damaging cross-examination and that the witness would volunteer much evidence which petitioner could refute effectively when he took the stand. In the circumstances here, counsel's deliberate waiver of objections to hearsay evidence as a matter of trial strategy does not establish that he was incompetent. Cf. *Felton* v. *United States,* 170 F. 2d 153, 154 (C. A. D. C.), certiorari denied, 335 U. S. 831; *Burton* v. *United States,* 151 F. 2d 17, 18 (C. A. D. C.), certiorari denied, 326 U. S. 789.[6]

4. Finally, petitioner contends for the first time, that since the same evidence was used for his con-

[6] Cases cited by petitioner (Pet. 26) as being in conflict with the decision below are inapposite. In *Beckett* v. *Hudspeth,* 131 F. 2d 195 (C.A. 10), it was held that the accused had not been denied effective assistance of counsel, where his attorney held three conferences with him before pleading guilty. In *Thomas* v. *District of Columbia,* 90 F. 2d 424 (C.A. D.C.) the decision turned primarily upon the non-judicial attitude of the trial judge in refusing to hear defense witnesses and denial of counsel's right to argue the case, rather than upon any lack of effective assistance of counsel.

viction under count one as for count two, there was double punishment in violation of the Fifth Amendment by reason of the consecutive sentences, and the sentence under count one should be set aside (Pet. 26-27). The offenses, however, under the substantive aider and abettor count, and the conspiracy count were separate and distinct, and punishable by separate sentences. Cf. *Pinkerton* v. *United States,* 328 U. S. 640, 643-644; *United States* v. *Crowe,* 188 F. 2d 209 (C. A. 7); *Colosacco* v. *United States,* 196 F. 2d 165, 168 (C. A. 10).

There is no conflict on this point with *Sealfon* v. *United States,* 332 U. S. 575 (see Pet. 27). There, the trial court had so instructed the jury on a conspiracy count that an acquittal on that count necessarily operated to prevent proof of certain facts essential to establish the substantive offense. It did not bar later prosecution on the substantive count. See 332 U. S. at 579-580.

CONCLUSION

The case was decided upon established legal principles, and no question of sufficient importance to merit further review by this Court is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

OCTOBER 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 278226 4-13

OCT 31 19
HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 333

EVERETT EDWARD HACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

ALBERT WARD,
PALMER K. WARD,
318 Insurance Building,
Indianapolis, Indiana,
Atlantic 8450,
Counsel for Petitioner.

FERDINAND SAMPER,
Of Counsel,
816 Odd Fellow Building,
Indianapolis, Indiana.

Central Publishing Company, Indianapolis, Ind.

INDEX

	Page
Opinion Below	1
Question One	2–8
Amendment of Indictment	8–10
Question Two	10–11
Conclusion	12

LIST OF AUTHORITIES

	Page
Campbell v. United States, 167 F. (2d) 451, 452 (5 C. A.)	4,7,8
Dodge v. United States, 258 Fed. 300 (2 C. A.)	9
Ex Parte Bain, 121 U. S. 1	9,10
Fiswick v. United States, 329 U. S. 211	10
Krulewitch v. United States, 336 U. S. 440	10
Logan v. United States, 144 U. S. 263	10
Stewart v. United States, 12 F. (2d) 524, 525 (9 C. A.)	9
Jay G. Williams v. United States, 179 F. (2d) 656 (5 C. A.)	9,10
Wilson v. United States, 158 F. (2d) 659	7
United States v. Carll, 105 U. S. 611, 613	2, 5, 6,7,8
United States v. Debrow, 203 F. (2d) 699, 701	6
United States v. Denny, 165 F. (2d) 668, 669, 670 (7 C. A.)	9
United States v. Denny, (Dissent) 165 F. (2d) 671-673 (7 C. A.)	9
United States v. Fawcett, 115 F. (2d) 767 (3 C. A.)	9
United States v. Hack, 205 F. (2d) 723-729	2
United States v. Hess, 124 U. S. 483, 488	2,6
United States v. Howell, (11 Wall. 432)	3
United States v. Kelley, 186 F. (2d) 598, 602 (7 C. A.)	5
United States v. Litberg, 175 F. (2d) 20, 22 (7 C. A.)	6
United States v. McCulloch, 6 F. R. D. 559, (N. D. Ind.)	7

Page

United States v. Schneidermann, 102 F. Supp. 87, 92 6

United States v. Simmons, 96 U. S. 360, 362, 366.. 2

United States v. Standard Brewery, 251 U. S. 210 8

CONSTITUTION OF THE UNITED STATES

Sixth Amendment to the Constitution..... 8

Fifth Amendment to the Constitution..... 8

RULES OF COURT

Rule 7(c)..... 2, 3, 5, 6, 7, 8

Rule 7(e)..... 10

Rule 12(b) (2)..... 5

FORMS

Bishop's Forms (1885), p. 52, form 114..... 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 333

EVERETT EDWARD HACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

OPINIONS BELOW

The majority opinion of the Court of Appeals for the Seventh Circuit, and the dissenting opinion of Chief Judge

Major, are now reported in *United States* v. *Hack*, 205 F. (2d) 723-729.

QUESTION ONE

Respondent seems to admit that the decision of the lower courts upon the question of the sufficiency of the indictment as raised in Question One of defendant's petition is in conflict with applicable decisions of this Court in *United States* v. *Carll*, 105 U. S. 611, 613, *United States* v. *Simmons*, 96 U. S. 360, 362, 366, and *United States* v. *Hess*, 124 U. S. 483, 488 (Petition 17, 18), but it attempts to avoid the effect of such admission in footnote 1, page 7 of its brief by saying that

> "The later decisions of this court have deprived *United States* v. *Carll*, 105 U. S. 611 of any vitality";

the footnote is carried over to page 8 of respondent's brief, where it is said:

> "*Carll*, moreover, was decided long prior to the advent of Rule 7(c), which was clearly satisfied here."

On page 7 of respondent's brief it is said:

> "The allegations that the notes were passed with intent to defraud plainly implied that the defendants knew they were counterfeit for without knowledge of the counterfeit nature of the notes, the passing would not have been with intent to defraud."

We agree that without knowledge of the counterfeit nature of the notes, the passing would not have been with intent to defraud; this statement of respondent must be what the court had in mind in *United States* v. *Carll*, 105 U. S. 611, 613, when it said that,

> "knowledge that the instrument is forged and counterfeited is *essential to make out the crime;* and an

> uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object. * * * This indictment, by omitting the allegation contained in the indictment in *United States v. Howell* (11 Wall. 432), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime. The omission is of matter of substance," and not of form. (Emphasis added.)

Rule 7(c) of Federal Rules of Criminal Procedure is apparently based upon the language used in the *Carll* case, as it provides that

> "the indictment shall be a plain, concise and definite written statement of the *essential facts constituting* the offense charged." (Emphasis added.)

Of course respondent is in error in the statement that

> "the allegation that the notes were passed with intent to defraud plainly implied that the defendants knew they were counterfeit." (p. 7, respondent's brief.)

Many dollars are "passed with intent to defraud," in fraudulent transactions, where the "intent to defraud" may, or may not, involve the validity of government obligations, and it will not do to give judicial sanction to the proposition that the allegation that notes were passed with intent to defraud plainly implied that the passer knew they were counterfeited. Attention is directed to the Government's evidence in this case which shows that the bill or note in question was

> "a dangerous and deceptive counterfeit note. The

> average merchant would be apt to take in such a counterfeit and not be able to tell its counterfeit nature." (R. 17, 18.)

Count I of the indictment charges that on the 15th day of December, 1951, Ada Miller did, at Indianapolis, Indiana, with intent to defraud, pass a counterfeited obligation of the United States (R. 1); it attempted to charge petitioner Hack as an aider, and, after thus describing the offense against Ada Miller, as indicated, but omitting therefrom the essential element of guilty knowledge, the charge is

> "That Edward Everett Hack and David Bocock did procure the commission of said offense by Ada Miller." (R. 2.)

The indictment does not charge that Hack, as an aider and abettor, acted "with similar intent," or with "guilty knowledge," or, "with being present at the commission of said felony, feloniously aiding, inciting and abetting said Ada Miller," or, that as an accessory before the act committed by the principal, he "feloniously counseled, aided, incited and procured said principal to commit, in manner and form aforesaid, the said felony." See Bishop's Forms (1885), p. 52, form 114; or, as the indictment charged in *Campbell* v. *United States*, 167 F. (2d) 451, 452 (5 C. A.) that the aiding and abetting defendant

> "was then and there present, aiding, abetting, counseling, assisting and advising the defendant John Allen Campbell the offenses aforesaid in the manner and form aforesaid to do and commit."

The indictment which defendant now brings to the Court does not charge Hack with the commission of any offense, fixes no time or place of the commission of any criminal act by Hack, but simply says that

> "Hack * * * did procure the commission of said offense,"

and upon such statement he now stands convicted and must serve five years in the penitentiary, with no valid charge against him.

The statement of respondent that *United States* v. *Carll*, 105 U. S. 611, has been deprived of its validity by later decisions of this Court, and the further statement that the present indictment satisfies the requirements of Rule 7(c), seem to make it imperative that the writ prayed for herein should be granted in order that this Court may determine whether federal criminal procedure can be sustained which is in direct conflict with the former decisions of this Court as charged in petitioner's Question One.

Defendant very earnestly contends that *United States* v. *Carll*, 105 U. S. 611, has not been overruled, nor deprived of any of its vitality, but it is still in full force, and governs the procedure to be followed in forgery cases; it has been so regarded by other courts, both before and since the advent of Rule 7(c), and said Rule does not authorize the omission of an *essential* element from an indictment; Rule 7(c) has not been satisfied by the indictment which defendant now presents to this Court.

To sustain this contention, defendant calls attention to the following decisions:

On January 3, 1951, the Seventh Circuit, in *United States* v. *Kelley*, 186 F. (2d) 598, 602, relied upon, and cited, *United States* v. *Carll*, 105 U. S. 611, 613, to support its position

> "that proof of intent by defendant to defraud and knowledge on his part that the notes were counterfeited is essential to his conviction. *United States* v. *Carll*, 105 U. S. 611, 613, 26 L. Ed. 1135."

On June 14, 1949, the Seventh Circuit, in *United States* v. *Litberg,* 175 F. (2d) 20, 22, relied upon *United States* v. *Carll* to support its position that

> "The scienter of the offenses charged is that the notes were passed or possessed 'with intent to defraud and with knowledge that they were counterfeited,' and in the absence of proof of such intent and knowledge a judgment of conviction cannot stand. *United States* v. *Carll,* 105 U. S. 611, 613, 26 L. Ed. 1135."

On December 11, 1951, District Judge Mathes, of the Southern District of California, in *United States* v. *Schneidermann,* 102 F. Supp. 87, 92, relied upon and quoted from *United States* v. *Carll,* 105 U. S. 611, 612-613, as follows:

> "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

Judge Mathes also relied upon *United States* v. *Hess,* 124 U. S. 483, which he quoted from on page 91 of 102 F. Supp., and which is cited and relied upon by defendant on page 18 of his petition.

On April 10, 1953, the Fifth Circuit, in *United States* v. *Debrow,* 203 F. (2d) 699, 701, construed Rule 7(c), as follows:

> "Rule 7(c) is designed to simplify indictments by eliminating unnecessary phraseology which needlessly burdened many indictments under the former practice. It does not and it was never intended that this rule should alter or modify the fundamental functions and requirements of indictments. Every ingredient or essential element of the offense sought to be charged must still be alleged in the indictment. *Wilson* v. *United States,* 158 F. (2d) 659, 67 S. Ct. 1095."

We understand that certiorari was granted by this Court in the *Debrow* case on June 15, 1953. If the *Debrow* case turns upon, or is materially affected by the contention of the respondent that under Rule 7(c) it is no longer necessary to set out essential facts which constitute the offense charged in indictments for uttering forged obligations of the United States, then petitioner's case bears a similarity to the *Debrow* case and certiorari should be granted.

On April 1, 1948, the Fifth Circuit, in *Campbell* v. *United States,* 167 F. (2d) 451, 453, relied upon *United States* v. *Carll,* 105 U. S. 611, to support its conclusion that the statute upon which the indictment was founded in that case only described the general nature of the offense prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, stated no matters upon which issue could be formed for submission to a jury.

On March 5, 1947, District Judge Swygert, for the Northern District of Indiana, in *United States* v. *McCulloch,* 6 F. R. D. 559, held that Rule 7(c) of the Rules of Criminal Procedure did

> "not change the essential requirements of a valid indictment. Each and every element of an offense must

be charged in an indictment. *United States* v. *Standard Brewery*, 251 U. S. 210, 46 S. Ct. 139, 64 L. Ed. 229. The rule itself provides that it shall be a 'definite written statement of the essential facts constituting the offense charged.' "

If Rule 7(c) of the Federal Rules of Criminal Procedure is to be construed as authorizing the omission from an indictment for uttering a forged obligation of the United States the essential fact of "guilty knowledge," and omitting the essential fact of "intent to defraud," then it is in violation of that part of the Sixth Amendment to the United States Constitution which provides that in all criminal prosecutions, the accused shall be entitled to be informed of the nature and cause of the accusation against him, and it is in violation of that part of the Fifth Amendment to the United States Constitution which commands that he shall not be held to answer for an infamous crime, unless on a presentment or indictment of a Grand Jury, and he shall not be deprived of his liberty or property, without due process of law.

These constitutional provisions require that the indictment must be a legal and valid charge, containing all the essential elements necessary to constitute the offense intended to be punished. *United States* v. *Carll*, 105 U. S. 611, 613; *Campbell* v. *United States*, 167 F. (2d) 451, 453.

In defendant's Question One, page 18 of his petition, it is contended that the decision of the lower court in granting leave to the United States to "amend the indictment by reversing the name of the defendant, Edward Everett Hack, to Everett Edward Hack * * * and the indictment is amended accordingly," is a decision of a federal question in direct conflict with the former decision

of this Court in a similar matter in *Ex Parte Bain*, 121 U. S. 1 (Pet. 18).

Respondent seems to admit that defendant's contention in this regard is correct, but in a footnote on page 8 of its brief, the view is taken that the changing of the indictment by such amendment "was obviously not a substantial change as was involved in *Ex Parte Bain*, 121 U. S. 1."

Defendant contends that the accused can only be tried upon the indictment as found by the Grand Jury, and especially upon all its language found in the charging part of the instrument, which should include his correct name; this was the rule which was approved in *Ex Parte Bain*, 121 U. S. 1, and the court refused to follow the doctrine that "surplusage" could be stricken out of an indictment.

This question should be settled by this Court, because the Courts of Appeal have divided on it; see *Stewart* v. *United States*, 12 F. (2d) 524, 525 (9 C. A.); *Dodge* v. *United States*, 258 Fed. 300 (2 C. A.), which hold that indictments cannot be amended by the court; in *United States* v. *Fawcett*, 115 F. (2d) 767 (3 C. A.), the court decided that some amendments may be made; in *United States* v. *Denny*, 165 F. (2d) 668, 669, 670 (7 C. A.), it is held that an indictment requiring amendment of substance must be sent back to the Grand Jury, but the majority opinion concluded that the change of defendant's name from "Kenny" to "Denny" was only a formal matter and could be made by amendment; Circuit Judge Minton dissented, and in a separate opinion, 165 F. (2d) 671-673, held that amending the body of the indictment in such a material matter as the defendant's name vitiated the indictment and destroyed the court's jurisdiction.

In *Jay G. Williams* v. *United States*, 179 F. (2d) 656, the

Fifth Circuit approved of an amendment made to an indictment which charged defendant Williams and Lindsley Lumber Co., with others, with having violated Section 52 (now Section 242), Title 18 U. S. C. A., Section 20, U. S. Criminal Code, where the amendment consisted of changing the name of "Lindsley Lumber Co." to that of "Dania Supply Company, doing business as the Lindsley Lumber Co."; however, Dania Supply Company was not convicted; the question was presented by defendant Williams; the court concluded that the amendment was without the slightest prejudice to Williams. We understand certiorari was granted in the *Williams* case, 340 U. S. 850, and the decision was affirmed, 341 U. S. 97, but the question as to the validity of the indictment after amendment was apparently not an issue in this Court.

In considering this question, it should be observed that Rule 7(e) of the Federal Rules of Criminal Procedure provides that

> "The court may permit an information to be amended at any time before verdict or finding if no additional offense is charged and if substantial rights of the defendant are not prejudiced."

But no such right to amend is provided as to *indictments,* which should be a persuasive reason for the conclusion that *Ex Parte Bain,* 121 U. S. 1, is the law which should govern in this case.

QUESTION TWO

On page 9 of respondent's brief, in discussing Question Two, it is said, in footnote 3, that *Fiswick* v. *United States,* 329 U. S. 211, *Logan* v. *United States,* 144 U. S. 263, and *Krulewitch* v. *United States,* 336 U. S. 440, cited by peti-

tioner for the proposition that admissions and declarations of a co-conspirator, after confession of his own guilt to officers, are inadmissible against his erstwhile fellow conspirators, as claimed by petitioner on page 24 of his petition, are inapposite, because Monroe's testimony related to acts and declarations by petitioner himself; this statement of respondent is made in connection with the further statement on page 9 of its brief that

> "After Monroe arrived (in Indianapolis) with his family on December 12, petitioner, in an unsuccessful effort to get Monroe to join the conspiracy," showed his $2,000 in "real mint" counterfeit currency, stated that he would give the orders about what to do, and announced that he was the "head man."

But no conspiracy was shown to exist on December 12th, or the early morning of December 13th; no connection is claimed to have existed between Monroe and petitioner, except as to what occurred between them on December 12th and 13th; petitioner, his sister Ada, and Bocock, met at the home of Monroe in Louisville on December 9th, but no one claims that there was any evidence of any conspiracy being in existence at that time, or that the commission of any offense was in contemplation or in any manner referred to at that time; none of the statements or acts of Monroe, after December 13th, was admissible against petitioner, whether they were acts or declarations of Monroe's own conduct, or whether he was relating acts or declarations of petitioner, because Monroe and petitioner were not shown by any evidence to have been connected in any manner, or had any contact or dealings with each other after December 13th.

Petitioner respectfully submits that his petition for certiorari should be granted.

ALBERT WARD,
PALMER K. WARD,
318 Insurance Building,
Indianapolis, Indiana,
Atlantic 8450,
Counsel for Petitioner.

FERDINAND SAMPER,
Of Counsel,
816 Odd Fellow Building,
Indianapolis, Indiana.
October 30, 1953.

End